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**JUN 30 1997**

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Re: WRLT(FM); Franklin, TN  
Tuned In Broadcasting, Inc. ("TIB")  
BPH-960306ID

Dear Counsel:

The staff has under consideration the above-captioned minor change "one-step" application filed on behalf of TIB to upgrade station WRLT from Class A to Class C3 pursuant to the *Report and Order* in MM Docket 92-159.<sup>1</sup> To implement the proposed facility, TIB requests waiver of 47 CFR §§ 73.203, 73.3573 and 73.213(a). As explained below, we will deny TIB's request for waiver of 47 CFR §§ 73.203 and 73.3573 and dismiss the application.

**ALLOTMENT SITE**

**Proposed "One-Step" Allotment Site does not Comply with Minimum Spacing Criteria  
- Waiver Requested**

The proposed "one-step" Class C3 allotment site does not meet the minimum separation requirements of 47 CFR § 73.207 with respect to first-adjacent channel Class C station WVVR(FM), Hopkinsville, Kentucky and second-adjacent channel Class C station WWTN(FM), Manchester, Tennessee.<sup>2</sup> Sections 73.203 and 73.3573 of the Commission's rules require that an allotment site comply with the minimum separation requirements of § 73.207. TIB states that it is unable to designate a fully-spaced allotment site due to the grandfathered short-spacings with WVVR and WWTN and therefore, requests waiver of §§ 73.203 and 73.3573. To support the waiver request, TIB alleges the following justifications:

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<sup>1</sup> In the *Report and Order* in MM Docket 92-159, *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, effective August 18, 1993, the Commission modified its rules to permit licensees and permittees to request by application upgrades on adjacent and co-channels modifications to adjacent channels of the same class, and downgrades to adjacent channels.

<sup>2</sup> The required spacing toward WVVR(FM) is 176 kilometers, while the proposed spacing is 142.8 kilometers and the required spacing toward WWTN(FM) is 96 kilometers, while the proposed spacing is 20.7 kilometers.

***1. WRLT does not provide adequate 70 dBu coverage to its entire city of license.***

TIB provides a plot of the 70 dBu contour produced by WRLT's licensed facility, where the distances to the 70 dBu contour are calculated using the standard method set forth in 47 CFR

§ 73.313, to show that the predicted 70 dBu contour contains only 60.9% of the land area and 61.6% of the population of Franklin. Further, TIB provides a tabulation of field strengths, also calculated using the standard prediction method, to show that at 22 equally spaced points within Franklin, WRLT is predicted to provide a signal strength of less than 70 dBu at half (11) of those points.

Additionally, TIB states that WRLT's ability to provide city-grade coverage is hindered by interference caused by WWTN to WRLT's signal within Franklin and submits listener complaints as documentation. TIB asserts that the requested Class C3 facility would produce a predicted 70 dBu contour which would encompass all of Franklin and increase the median signal strength level within Franklin by more than 300% enabling WRLT to overcome interference from WWTN. As precedent for grant of its waiver request, TIB cites *Golden West Broadcasters*, 4 FCC Rcd. 2097, (1989) and *Beasley Broadcasting of Philadelphia, Inc. (WXTU) Philadelphia, Pennsylvania*, 100 FCC 2d 106 (1985) ("*Golden West and Beasley Broadcasting*").

***Discussion***

The facts provided by TIB are insufficient to justify waiver of §§ 73.203 and 73.3573.

***70 dBu coverage of Franklin***

We do not dispute TIB's claim that WRLT does not presently comply with the community of license coverage requirements of 47 CFR § 73.315(a) when the distance to WRLT's 70 dBu contour is predicted using the standard method set forth in 47 CFR § 73.313. However, our analysis reveals that a Class A facility, operating at the same location proposed in the application with the maximum permitted effective radiated power and antenna height above average terrain (6 kW/100 meters or the equivalent), would comply with the community of license coverage requirements of § 73.315.<sup>3</sup> Therefore, because TIB has not sufficiently demonstrated that the proposed Class C3 facility is necessary to comply with the provisions of § 73.315, waiver of §§ 73.203 and 73.3573 is not justified.

***Interference Complaints***

To demonstrate that WWTN causes interference to WRLT within the city of Franklin, TIB references listener complaints of interference received by WRLT. However, our review of the complaints reveals that they do not establish that interference to WRLT's signal is occurring in Franklin.<sup>4</sup> Therefore, because the complaints do not adequately demonstrate that the requested Class C3 facility is necessary to overcome interference from WWTN, waiver of §§ 73.203 and 73.3573 is not justified.

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<sup>3</sup> To comply with § 73.315, applicants are required to demonstrate that at least 80% of the community of license is covered by a 70 dBu signal. A maximum Class A facility operating at the location proposed in the application would contain more than 90% of the land area of Franklin. However, as with the requested Class C3 facility, waiver of 47 CFR § 73.213(a) is required to authorize a facility at that location.

<sup>4</sup> The interference complaints consist of letters from listeners complaining of interference, a list of names of complainants that had called the station complaining of interference, and copies of postcards signed by listeners. The majority of the complaints (the telephone list and postcards) do not specifically state where the individual complainants are experiencing interference or the nature of the interference. For example, the postcards contain a pre-printed request that the FCC ". . . allow WRLT to increase its power, and thus reduce interference caused by neighboring stations." Further, the few letters from WRLT listeners which describe the nature of the interference indicate that the interference is occurring outside of Franklin. One letter is from an address in Franklin but it does not specifically state where the listener is experiencing interference.

### *Golden West and Beasley Broadcasting*

In *Golden West and Beasley Broadcasting*, deficient community coverage was documented through supplemental line-of-sight analyses and field strength measurements, performed in accordance with 47 CFR § 73.314. These showings warranted waivers of 47 CFR § 73.211 (*Golden West*) and 47 CFR § 73.207 (*Beasley Broadcasting*) to enable the involved stations to substantially improve signal strength within their cities of license. However, neither a class upgrade nor waiver of §§ 73.203 and 73.3573 was involved in either situation. Therefore, *Golden West and Beasley Broadcasting* is not precedent for grant of TIB's request.

### **2. Commission precedent exists for requested waiver**

TIB cites the *Report and Order* in MM Docket No. 88-111, 3 FCC Rcd 6152 (1988) ("*Vero Beach*"), the *Report and Order* in MM Docket No. 90-44, 10 FCC Rcd 2864 (1995) ("*East Los Angeles*"), and the *Letter from Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau to El Dorado 98.3, Inc.*, (May 25, 1995) ("*El Dorado*") as precedent for its request for waiver of §§ 73.203 and 73.3573.

#### **Discussion**

##### *Vero Beach*

In *Vero Beach*, the Commission modified the allotment for Vero Beach, FL from Channel 228A to Channel 229C2. Although the allocation did not negate the existing short-spacing it did reduce the short-spacing. In contrast to *Vero Beach*, TIB proposes to increase the existing short-spacing between WRLT and WWTN from 57 to 75 kilometers. As a result, *Vero Beach* is not precedent for grant of TIB's request.

##### *East Los Angeles*

In *East Los Angeles*, the Commission modified the location and the community of license for the Channel 250B allotment for Long Beach, CA from Long Beach, CA to East Los Angeles, CA. Although the East Los Angeles allocation increased an existing short-spacing by 1 km, the protected (60 dBu) and interfering (100 dBu) contours of the East Los Angeles allotment and the short-spaced station were not predicted to overlap. In contrast to *East Los Angeles*, TIB proposes to increase the class of the Manchester allotment from Class A to Class C3, significantly increase the short-spacing between WRLT and WWTN, and create new predicted areas of overlap between the protected (60 dBu) and interfering (100 dBu) contours of WRLT and WWTN. Accordingly, *East Los Angeles* is not precedent for grant of TIB's request.

##### *El Dorado*

In *El Dorado*, the Audio Services Division granted waiver of 47 CFR § 73.213(a).<sup>5</sup> Therefore, the requested waiver of §§ 73.203 and 73.3573 does not fall within this precedent.

### **3. Grant of the waiver would result in a gain in the population and area within WRLT's primary service contour.**

TIB states that grant of the waiver is in the public interest because the Class C3 upgrade would result in a gain in the population (249,117 persons) and area (3,060 km<sup>2</sup>) within WRLT's primary service contour (60 dBu).

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<sup>5</sup> Waiver of § 73.213(a) was warranted by a reduction in an existing "grandfathered" short-spacing and a reduction in the population predicted to receive interference.

### ***Discussion***

Review of Commission records reveals that the proposed new service area is completely within the service areas of eight (8) FM stations and partially within the service area of six (6) additional FM stations. Also, the proposed new service area is completely or partially within the service areas of at least five (5) AM stations. Thus, the area to receive proposed new service from WRLT is neither unserved by other broadcast signals nor underserved (only one signal). Therefore, the incremental benefit of an additional service when many other stations are already available, becomes diminished and less persuasive in justifying waiver of the technical rules.

### ***Summary - Request for Waiver of 47 CFR §§ 73.203 and 73.3573***

TIB requests, in essence, waiver of the Commission's longstanding allotment standards. The Commission has stated that the nationwide FM allotment method is constructed on two core technical requirements: (1) that allotment sites comply with the minimum spacing requirements of § 73.207 and (2) satisfy the community coverage requirements of § 73.315. The goals of the allotment scheme are to prevent overcrowding of FM stations and provide a consistent, fair, efficient, and equitable distribution of FM facilities as required by Section 307(b) of the Communications Act.<sup>6</sup> The Commission has indicated that all applicants using the "one-step" process must satisfy the same allotment requirements as petitioners in an allotment rulemaking proceeding to amend the FM Table of Allotments.<sup>7</sup> Further, the Commission has indicated that where a station seeks modification using the "one-step" process and is unable to demonstrate that a suitable allotment site exists that would satisfy the spacing and community coverage requirements for the station's channel and class, the application would be dismissed.<sup>8</sup> This policy is strictly enforced even where the applicant intends to utilize the more lenient spacing and contour protection requirements of 47 CFR § 73.215. There is no precedent for waiver of the allotment requirements. The Commission has generally held that to justify waiver of § 73.207 to create a sub-standard allotment, the showing must be compelling.<sup>9</sup> In these circumstances we decline to depart from our strict enforcement policy. Moreover, we note that TIB's proposed waiver would have far-reaching impact on our licensing policies.

In light of the above, TIB's request for waiver of §§ 73.203 and 73.3573 will be denied.

## **TRANSMITTER SITE**

### **Proposed Facility in Violation of 47 CFR § 73.213(a) - Waiver Requested**

WRLT's licensed transmitter site is located within WWTN's 60 dBu contour and therefore, pursuant to 47 CFR § 73.213(a), TIB is not allowed to further extend WRLT's 1 mV/m contour toward WWTN. TIB's application proposes to extend WRLT's 1 mV/m contour beyond that of its licensed facility. As a result, the proposed facility is in violation of § 73.213(a). TIB recognizes this violation and requests waiver of § 73.213(a) asserting that waiver of the rule is in the public interest because it will reduce the grandfathered short-spacing to WVVR and create no new significant areas of interference.

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<sup>6</sup> See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5358 (1991) (para. 13).

<sup>7</sup> See *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4737 (1993) (para. 13).

<sup>8</sup> *Id.* at 4737 (para.14)

<sup>9</sup> See *Bristol, Tennessee*, 46 RR 2d 650 (1979) (request to create a short-spaced allotment denied).

### Discussion

Because waiver of §§ 73.203 and 73.3573 will be denied, we will not address TIB's request for waiver of § 73.213(a). Additionally, the application of § 73.213(a) is currently the focus of a rulemaking proceeding.<sup>10</sup> Therefore, we will not now anticipate the results of that rulemaking proceeding in the context of the present application with respect to § 73.213(a).<sup>11</sup>

### CONCLUSION

We have carefully weighed the advantages and disadvantages of the proposed operation, but find that the negative factors -- an unprecedented waiver of the Commission's allotment standards -- far outweigh the positive factors presented in support of this application.

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v. FCC*, 832 F.d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grand Family Radio Fellowship, INC. v. FCC*, 406 F.d 644,666 (D.C. Cir. 1968) (per Curiam)). We have afforded TIB's waiver requests the "hard look" called for under the WAIT Doctrine, *WAIT Radio v. FCC*, 418 F2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in the justifications are insufficient to waive §§ 73.203 and 73.3573.

Accordingly, for the reasons stated above, the request for waiver of 47 CFR §§ 73.203 and 73.3573 IS HEREBY DENIED and application BPH-960306ID IS HEREBY DISMISSED for violation of 47 CFR §§ 73.203 and 73.3573 with respect to WVVR(FM) and WWTN(FM).<sup>12</sup> This action is taken pursuant to 47 CFR § 0.283. Further, since TIB has failed to present adequate reasons which, if true, would justify the requested waiver, TIB is not entitled to an evidentiary hearing as a matter of law. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

Sincerely,



Dennis Williams  
Assistant Chief  
Audio Services Division  
Mass Media Bureau

cc: Tuned In Broadcasting, Inc.  
du Treil, Lundin & Rackley, Inc.

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<sup>10</sup> *Grandfathered Short-Spaced FM Stations (NPRM)*, MM Docket 96-120, 61 Fed. Reg. 33474, released June 14, 1996.

<sup>11</sup> Analysis reveals that a Class A facility, operating at the transmitter site specified in the application with the maximum permitted effective radiated power and antenna height above average terrain (6 kW/100 meters or the equivalent), would comply with § 73.213(a) as proposed in the NPRM. However, as noted, the rulemaking to modify § 73.213(a) is currently pending.

<sup>12</sup> See *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992) (para. 22). (The Commission will not permit corrective amendment of defects that result from staff denial of a waiver request.)

